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Attorneys for Plaintiffs Justin James and Nicole James

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

14 JUSTIN JAMES and NICOLE JAMES; ) Case No. CV-08-0397-BR  
15 Plaintiffs, )  
16 v. )  
17 FREMONT REORGANIZING ) MEMORANDUM OF LAW IN  
COMPANY, fka FREMONT ) SUPPORT OF PLAINTIFFS'  
18 INVESTMENT & LOAN COMPANY, ) MOTION TO COMPEL DISCOVERY  
a California corporation; BRIDGE ) FROM DEFENDANT FREMONT  
19 CAPITAL CORPORATION, a ) REORGANIZING COMPANY, fka  
California corporation; HSBC BANK ) FREMONT INVESTMENT & LOAN  
20 USA, NA, a national banking ) COMPANY  
association, )  
21 )  
22 Defendants )

## Introduction:

This case involves fraud and similar claims arising out of two refinanced mortgages, filed

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26 DISCOVERY FROM DEFENDANT FREMONT REORGANIZING COMPANY, fka  
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1 by a consumer against the lender defendant Fremont Reorganizing Company, fka Fremont  
 2 Investment & Loan ("Fremont"), and others.

3 Plaintiffs' Amended Complaint alleges that they are entitled to punitive damages as one  
 4 aspect of fraud damages, due to the reprehensibility of the conduct engaged in by Fremont. In  
 5 order to develop the evidence necessary to support an award of punitive damages, plaintiffs have  
 6 requested information on Fremont's financial state, as well as disclosure of other lawsuits filed  
 7 against Fremont by consumer borrowers. Fremont has objected and declined to produce this  
 8 information.

9 The substantive aspects of state law claims, such as fraud, are governed by state law.

10 Snead v. Metropolitan Property & Cas. Ins. Co., 237 F.3d 1080, 1090 (9<sup>th</sup> Cir. 2001). In Oregon,  
 11 punitive damages are governed by ORS 31.725. Subsection (6) of the punitive damages statute  
 12 states that "[d]iscovery of evidence of a defendant's ability to pay shall not be allowed by a court  
 13 unless and until the court grants a motion to amend a pleading under this section." As the federal  
 14 procedural rules allow plaintiffs to plead claims for punitive damages in their initial complaint,  
 15 the hurdle of filing a motion to amend to add punitive damages does not apply in the US District  
 16 Courts. Nonetheless, by inference ORS 31.725(6) makes it clear that a defendant's ability to pay  
 17 is a relevant and appropriate topic for discovery once punitive damages are at issue in the  
 18 pleadings. The Court should order Fremont to produce the documents requested, including ,  
 19 "financial statements, public filings, or other documents which evidence Fremont Investment &  
 20 Loan's or its successor's ability to pay any amount awarded to the plaintiffs in this case."

21 Declaration of Hope Del Carlo, ¶ 2.

22 \_\_\_\_\_ Similarly, the defendants have objected and refused to produce documents that relate to  
 23 similar lawsuits and enforcement actions filed by or on behalf of consumer borrowers. This  
 24 information is clearly relevant to assessing whether the defendant's conduct is widespread and

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 FREMONT INVESTMENT & LOAN COMPANY

1 represents a pattern of illegal activity, and thus the degree of reprehensibility that its actions  
 2 exhibit. State Farm Mut. Automobile Ins. Co. v. Campbell, 538 US 408, 123 S Ct 1513, 155 L  
 3 Ed 2d 585 (2003). Among other factors, courts examining punitive damages must gauge the  
 4 fairness of punitive damages awards by examining whether "the conduct involved repeated  
 5 actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or  
 6 deceit, or mere accident." Id. at 419. Without the records plaintiffs have requested they have no  
 7 means of compiling this evidence and presenting it at trial. Plaintiffs have made discovery  
 8 requests for records of "public complaints [such as those made to state attorneys general and  
 9 other regulators]," and "legal claims filed against Fremont Investment & Loan by consumer  
 10 borrowers, whether denominated as affirmative lawsuits, counterclaims, or adversary  
 11 proceedings in bankruptcy." Both of these requests are narrowly aimed at eliciting the type of  
 12 information contemplated in State Farm and similar opinions reviewing awards of punitive  
 13 damages.

14 In conclusion, plaintiffs request that the Court order Fremont to produce financial  
 15 information and records of other consumer lawsuits and complaints to government entities, as  
 16 both sets of information are relevant and necessary to establishing their punitive damages claims  
 17 against Fremont.

18 DATED this 30<sup>th</sup> day of November, 2009.

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